BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2020-263-E

Cherokee County Cogeneration Partners, LLC Complainant/Petitioner, v. Duke Energy Progress, LLC and Duke Energy Carolinas, LLC, Defendants/Respondents.	)	**DUKE ENERGY CAROLINAS, LLC's AND DUKE ENERGY PROGRESS, LLC's PETITION FOR RECONSIDERATION OR REHEARING OF ORDER 2021-604**

Pursuant to S.C. Code Ann. Section 58-27-2150 and S.C. Code Ann. Regs. Sections 103-854, 103-825 and 103-830, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (together, the "Companies"), by and through counsel, respectfully submit this Petition to the Public Service Commission of South Carolina (the "Commission") requesting that the Commission reconsider and/or clarify its findings in Ordering Paragraphs Nos. 1-3 of Order No. 2021-604 ("Order"). In particular, the Companies respectfully request that the Commission:

(1) Reconsider its finding that Cherokee County Cogeneration Partners, LLC ("Cherokee") established a legally enforceable obligation ("LEO") with DEC as of September 17, 2018; and

(2) Clarify that, regardless of LEO date, DEC should use an avoided cost methodology that is consistent with the methodology determined and approved by the Commission in Order No. 2019-881(A) to calculate just and reasonable avoided cost rates to be paid to Cherokee.

With respect to issue (1), Cherokee could not have established a legally enforceable obligation in September 2018 because, among other shortcomings, Cherokee's conduct demonstrated that it was free to walk away from its September 2018 offer at any time and, in fact, did so by offering to sell to DEP in December 2018. The Order fails to address DEC's arguments in this regard and creates risk for customers that future qualifying facilities ("QF") will assert a non-contractual LEO without actually "obligati[ng itself] for the delivery of energy or capacity over a specified term" as required by the Federal Energy Regulatory Commission's ("FERC") regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA").

Regarding issue (2), without further clarity from the Commission, the Parties lack sufficient direction to resolve their chief remaining dispute—the appropriate methodology by which to calculate avoided cost rates—and move forward towards a new power purchase agreement ("PPA"). As written, the Order creates ambiguity by directing DEC to calculate avoided cost rates using "the avoided cost rate methodology determined and approved by the Commission and existing on September 17, 2018." This holding creates ambiguity because no such Commission-approved methodology existed in September 2018. At that time, the Commission had not approved a methodology for establishing avoided cost rates for large QFs. Instead, the Commission's guidance for DEC and DEP reflected in Order No. 2016-349 required the Companies to negotiate with QFs that were not eligible for the standard offer consistent with PURPA and FERC's implementing regulations. Order No. 2016-349 did *not* approve a specific methodology. Because there was no Commission-determined and approved methodology as of September 2018, the Order fails to specifically resolve whether Cherokee is entitled to payment for avoided capacity costs even in years where DEC has no undesignated capacity need. In the Companies' view, the law is clear that DEC should calculate avoided cost rates consistent with the methodology determined and approved by the Commission after extensive review in Order No. 2019-881(A), consistent with the standard methodology used by the Company to calculate avoided cost rates for large QFs in September 2018, and consistent with FERC's clear direction in Order No. 872. Order No. 872 at P 171 (*citing* 168 FERC ¶ 61,184 at P 33 n.58 and *Ketchikan*, 94 FERC ¶ 61,293) ("*if a purchasing electric utility has no need for additional capacity* . . . *the purchasing utility's avoided cost for capacity would be zero*."). In the alternative, if the Commission were to accept Cherokee's position, the Cherokee Facility would be the only large QF that is entitled to a capacity payment regardless of utility capacity need, contrary to the methodology adopted in Order No. 2019-881(A).

Absent clarification regarding the methodology that DEC should use to develop September 2018 rate calculations, the Parties remain at an impasse and require more explicit Commission direction.

In support of this Petition, the Companies state as follows:

I. <u>The Commission Should Reconsider its Finding that Cherokee Established a Legally Enforceable Obligation in September 2018</u>

In support of its finding that Cherokee established a legally enforceable obligation in September 2018, the Commission's Order cites the letter Cherokee sent to DEC on September 17, 2018, emphasizing that: "Cherokee is making a legally binding offer of all capacity and energy associated with the Facility to DEC as of January 1, 2021[.]" Order at 34-35. However, the Commission's determination fails to address a variety of evidence, precedent, and other legal authority that counsel *against* accepting a September 2018 LEO date.

<u>The Order fails to address uncontroverted evidence that Cherokee could and, in fact, did walk away from its September 2018 offer to DEC</u>. As detailed in the Companies' Post-Hearing Brief, just six days after mailing its letter to DEC, Cherokee offered to sell all of its output to DEP pursuant to DEP's non-PURPA 2018 capacity solicitation. (Hrg. Ex. 12, at 1.) Cherokee then purported to make a second "legally binding offer of all capacity and energy associated with the Facility" to DEP under PURPA in December 2018. (Hrg. Ex. 13, at 27-29 (Timeline Attachment 6).) It is well settled that a QF cannot make a legally binding commitment to sell *all* of its capacity and energy to more than one utility at the same time. Because DEC and DEP are separately regulated entities and separate electric utilities under PURPA, Cherokee's subsequent offers to sell *all* of its power to DEP necessarily revoked any legally enforceable obligation it may have established with DEC in September 2018. *See* Federal Energy Regulatory Comm'n ("FERC") Order No. 872 at P 684, 687 (emphasizing that a LEO must create a meaningful and binding obligation on the QF that "allows utilities to reasonably rely on the LEO in planning for system resource adequacy."). The Order's Evidence section recites the fact that Cherokee's subsequent December 2018 offer to DEP occurred but *does not* mention Cherokee's bid for DEP's non-PURPA 2018 capacity solicitation. Moreover, the Order fails to engage in any analysis to explain how a legally enforceable obligation committing to sell to DEC could have existed in September 2018 if Cherokee was free to, and did, walk away from its purported commitment without consequent. Indeed, Cherokee's abandonment of its offer to DEC in favor of selling *all* of its power to DEP demonstrates that Cherokee never legally obligated itself to sell to DEC.

<u>The Order fails to address Commission precedent that no LEO is created when a QF is "free to walk away from the negotiations[.]"</u> In *Pacolet River Power Co., Inc. v. Duke Power Co.*, the QF argued that its letter to the utility requesting a long-term contract under PURPA at rates available as of the date of the letter established a legally enforceable obligation. Order on Remand Dismissing and Denying Complaint, Dkt. No. 95-1202-E, Order No. 2001-663, at 4 (Jul. 24, 2001). Like Cherokee, the QF was already operational and had an active PPA with the utility at the time it purported to create a new LEO by letter. In finding the QF's letter "did not and could not create a 'legally enforceable obligation[,]'" the Commission emphasized the lack of any legal consequence to the QF if it chose to "walk away" from its purported commitment. *Id.* ("because Pacolet was free to walk away from the negotiations without liability, . . . no 'legally enforceable obligation' was created"). As the Companies explained in some detail in their Post-Hearing Brief, Cherokee—like Pacolet—suffered no consequence when it walked away from its purported commitment to DEC and instead offered to sell *all* of its power to DEP. Despite the similar facts at issue in *Pacolet* and presented in this proceeding, the Order fails to even reference the *Pacolet* case, let alone distinguish it or otherwise explain the Commission's decision to depart from this long-standing precedent.

***<u>The Order fails to address whether a LEO is open-ended or limited to a reasonable period of time to execute a power purchase agreement ("PPA")</u>*.** The actual terms of the modified Notice of Commitment Form Cherokee submitted to DEC did not purport to preserve Cherokee's right to sell its output in perpetuity. Instead, it provided that the avoided cost rates would expire thirty (30) days after the utility delivered a PPA to the QF if the QF failed to execute or otherwise contractually obligate itself. While

Cherokee contends—contrary to this language—that its LEO rights were not time limited, DEC/DEP Witness Glen Snider explained that the standardized process DEC followed with Cherokee in the fall of 2018 imposed a reasonable sixty (60) day limit on the time to finalize negotiations for a new PPA. (Tr. Vol. 2, 390.14.) The Commission's Order fails to address whether a LEO extends indefinitely or whether a QF must take action to execute a PPA within a reasonable time limit to preserve its right.

<u>The Order misinterprets a QF's right to contract for rates calculated "at the time of delivery" by setting a date certain for rate calculation prior to the contact term</u>. As the Commission noted, FERC's implementing regulations at 18 C.F.R. 292.304(d)(1)(i)-(ii) provide QFs the option to "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term," at avoided cost rates calculated based on either (1) the time of delivery; or (2) the time that the legally enforceable obligation is incurred. With respect to the former, the Commission held that the "time of delivery" in this case means fixing avoided cost rates for the full contact term as of January 1, 2021. Order at 40, ¶ 3. However, the Order's interpretation conflicts with the well-established meaning and application of the phrase "at the time of delivery" under FERC's implementing regulations. Contrary to the Order, the "time of delivery" is not intended to reflect rates calculated on a single, fixed date certain, but, instead, grants QFs the right to be paid a variable rate based on avoided costs calculated throughout the term of the contract or obligation at the time energy is delivered. *See* Order No. 872 at PP 98-101 (discussing the costs and benefits of allowing a QF to fix avoided costs as of the date a LEO is incurred as compared to the actual variable avoided costs calculated at the time of delivery); *see also Applied Energy Servs., Inc. v. Oklahoma Corp. Comm'n*, 31 F.E.R.C.

P 61,313, 61,708-09 (1985), Stalon, J., dissenting ("the QF [has] the additional option to specify, prior to the beginning of the contract term, whether it wish[es] the avoided costs on which the price would be based to be calculated at the time of delivery of the power or at the time the [legally enforceable] obligation was incurred. Under the latter option, the calculation would have to be based upon reasonable estimates of the utility's avoided costs over the life of the contract."); *Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390, 398-399 (D. Mass. 2016) (noting that a QF "may choose an as-available sale even if a legally enforceable obligation is an option"). In this way, FERC's implementing regulations allow QFs the option to obligate themselves under a contract to sell and deliver power over a specified term and to obligate the utility to pay avoided cost rates either fixed at the outset of the contract (*i.e.*, "calculated at the time the obligation is incurred") or to elect avoided cost rates that vary throughout the term of the contract (*i.e.*, "calculated at the time of delivery"). The Commission's interpretation, on the other hand, would invite speculation, providing QFs the option to lock into a rate years ahead of the contract term and then elect to take a higher fixed "time of delivery" rate at the outset of the contract. Since FERC's regulations provide the QF the option to determine the timing of calculating its avoided cost rates, the Order could be read to create "third option" for QFs that would unreasonably increase cost for consumers.

<u>The Order should explicitly limit its applicability to the current facts and circumstances</u>. As the Commission noted in its analysis, "there have been significant changes to federal and state law during the course of the negotiations between the parties[.]" Order at 17. Because many of the facts at issue in this case preceded the passage of both Act 62 and FERC Order No. 872, the Commission's determination of the issues presented are necessarily based on the unique set of facts and circumstances of this case and its determination should not have precedential impact. *See In the Matter of Time Warner Cable Southeast, LLC v. Energy United Electric*, Dkt. No. EC-82, Sub 19, 2016 WL 4268749 (N.C.U.C., Aug. 9, 2017) (in a complaint case, finding that "the Commission's ultimate decision . . . will not and cannot establish a precedent" when it is based upon "unique facts and circumstances").

II. **<u>The Commission Should Clarify that DEC Should Calculate Avoided Cost Rates for Cherokee Consistent with the Avoided Cost Methodology Approved by the Commission in Order No. 2019-881(A)</u>**

The Commission's Order directs that "the avoided cost rate shall be based upon the avoided cost rate methodology determined and approved by the Commission and existing on September 17, 2018, or at the time of delivery, which we find would have been January 1, 2021." Order at 35, 40. The Order further explains that "[i]t is just and reasonable for the avoided cost rates to be calculated using the Commission's approved and adopted methodologies for calculating capacity and energy avoided cost rates existing at the time." *Id.* at 35-36. To the extent the Commission continues to find that Cherokee established a LEO in September 2018 and Cherokee elects to be paid rates based on the date of the obligation, the Commission's Order creates ambiguity as to the applicable methodology DEC must use to calculate rates in a manner that will frustrate the parties' ability to execute a successor PPA.

<u>No Commission-approved avoided cost calculation methodology existed in September 2018</u>. Prior to the passage of Act 62, this Commission was not required to review and approve the methodology used by a utility to calculate its avoided cost rates. Cherokee's retained expert, Mr. Kurt Strunk, argued that the Commission "implicitly" accepted a calculation methodology in its Order No. 2016-349. (Tr. Vol. 3 p. 598.15.)

However, as Witness Strunk conceded during the hearing, that 2016 Order did not contain any discussion of rate calculation methodology.

> So, to be clear, Order 2016-349 on its face did not approve a methodology. You say it implicitly went against this principle, but it didn't dictate a methodology that the companies shall apply in calculating avoided-cost rates for large QFs, right?
>
> A No, the direction that that order gave was that the utilities were supposed to negotiate rates with large QFs.

(Tr. Vol. 3 p. 617.) Instead, the Commission summarily approved a stipulated revision to the Companies' standard offer tariff available only to small standard offer QFs 2 MW or less that adopted rates previously approved by the NCUC in 2015. In the absence of a Commission-approved avoided cost calculation methodology in existence in September 2018, the Commission's Order fails to provide necessary guidance to the parties to calculate appropriate avoided cost rates.

<u>The Order fails to resolve the Parties' dispute regarding Cherokee's right, or lack thereof, to a capacity payment regardless of utility need</u>. Cherokee contends that DEC offered avoided cost rates that were discriminatory because they did not ascribe an immediate undesignated need for capacity value to be paid for the Cherokee Facility's capacity in each year of the contract. To the contrary, however, the Companies' standard practice in September 2018 was to calculate avoided capacity rates for large QFs using the peaker methodology and ascribe avoided capacity value based on the utility's first year of capacity need. In other words, because DEC's first avoidable capacity need as identified in its 2018 IRP was projected to arise in 2028,[1] the forecasted five-year term avoided cost rates that DEC provided to Cherokee in October 2018 appropriately did not include any capacity payment to Cherokee.

In contrast to the uncontroverted lack of an approved methodology in Order No. 2016-349, this Commission's Order No. 2019-881(A) issued in the 2019 avoided cost proceeding under Act 62 clearly and unambiguously approved the Companies' approach to calculating avoided capacity costs—to calculate the avoided capacity costs based on the first year of capacity need projected in the current IRP and then levelize the capacity value over the contract term. Order No. 2019-881(A), at 83, 89.

Although no Commission-approved avoided cost methodology existed in September 2018 for negotiating with large QFs, the Companies' Post-Hearing Brief detailed the significant pre-2018 Commission precedent recognizing and approving the first year of capacity need principle in other contexts. *See* Post-Hearing Br. at 23-26. This included Commission Order No. 2018-322(A) issued May 2, 2018, setting avoided cost rates for Dominion Energy South Carolina, as well as the most recent NCUC avoided cost Order as issued October 11, 2017. *See* Post-Hearing Br. at 25-26. In contrast to this recent precedent that aligns with the methodology adopted by the Commission in Order No. 2019-88(A), Order No. 2016-349 did not contain any discussion of avoided capacity methodology.

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[1] *See* Duke Energy Carolinas, LLC 2018 Integrated Resource Plan at 55, Docket No. 2018-10-E (filed Aug. 31, 2018) ("DEC 2018 IRP").

Cherokee's claim to entitlement for full capacity payments remains the most significant dispute between the parties, and the Commission's Order does not provide sufficiently clear guidance to resolve the issue.

***The Commission should order DEC to calculate its avoided cost rates using the methodology approved by the Commission in Order No. 2019-881(A)*.** After extensive contested proceedings, the Commission clearly approved the Companies' avoided cost methodology in Order No. 2019-881(A), as required by Act 62. The methodology and rates approved therein were effective as of November 2018 for all QFs (both standard offer and large QFs) and also reflective of the methodology that the Companies applied prior to November 2018, including calculating rates for Cherokee in September 2018, for negotiations with all large QFs. For these reasons, the Companies respectfully request that the Commission clarify the Order and instruct the parties that DEC should use the methodology approved by the Commission in Order No. 2019-811(A) to calculate avoided cost rates owed to Cherokee. Importantly, ORS is supportive of this approach, as ORS witness Hipp "recommend[ed] the successor PPA for Cherokee reflect avoided energy and avoided capacity rates calculated based on the methodology approved by the Commission." (Tr. vol 3 p . 565, 568.5) Moreover, to choose a different methodology—particularly one that rejects the first year of capacity need principal—would improperly treat Cherokee more favorably than other similarly situated QFs and result in unjust and unreasonable costs for consumers.

***The Order fails to determine that the avoided cost rates proposed by Cherokee would exceed DEC's avoided cost and not be just and reasonable to consumers*.** The Order reasonably finds that it would be just and reasonable for the avoided cost rates to be calculated using the Commission-approved methodology, and DEC is seeking for the Commission to confirm that DEC should calculate these rates using the Commission-approved methodology applied to all other large QFs in September 2018 and that accurately reflects DEC's avoided cost projections at the time. The Order highlights Witness Glen Snider's testimony that Duke's avoided cost rates have "declined significantly since 2012," and included Mr. Snider's Figure 2, developed by the Public Staff of the NCUC, depicting these declines over time.

Snider Direct Figure 2:[2]

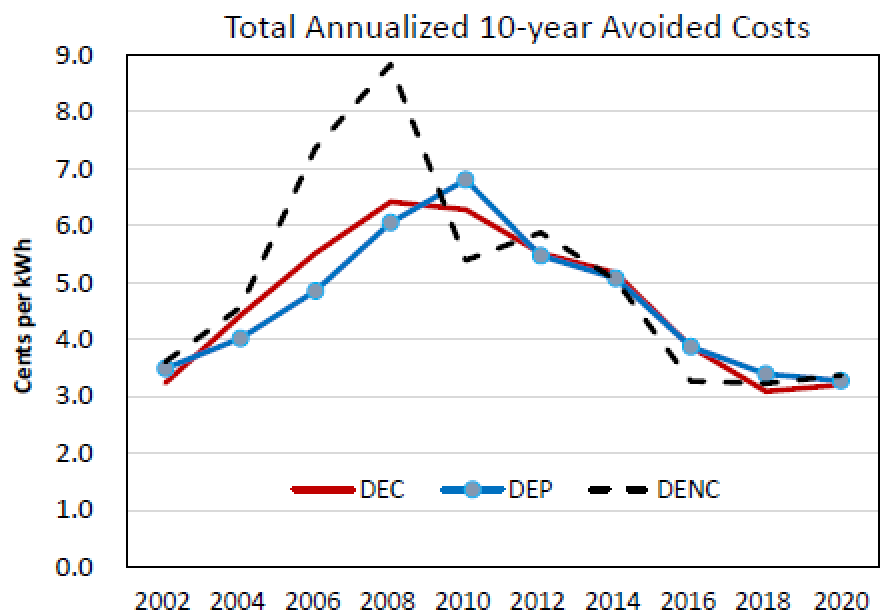

Figure 1: Total Annualized 10-year Avoided Costs (Approved and Proposed)

Order, at 13. However, the Order fails to recognize that Witness Strunk's alternative avoided capacity cost calculation resulted in rates that are significantly above DEC's 2018

[2] Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2020, Initial Statement of the Public Staff – North Carolina Utilities Commission at 8, Docket No. E-100, Sub 167 (Jan. 25, 2021) (showing approved total avoided costs for DEC, DEP, and Dominion Energy North Carolina from 2002-2018 and proposed annualized avoided cost rates for 2020).

avoided costs. In particular, the Companies' Post-Hearing Brief highlighted Witness Strunk's testimony that the capacity rate he calculated of $110/kW-year under a dispatchable tolling agreement translates to approximately $47/MWh for both capacity and energy under a traditional must-take agreement. (Tr. Vol. 1, pp. 201-02.) This $47/MWh rate is well above the actual total annualized 10-year avoided cost rates for DEC and DEP since at least 2018 as calculated by the Public Staff and presented in Figure 2 of DEC/DEP Witness Snider's testimony. (Tr. Vol. 3, pp. 390.33 (Snider Direct Figure 2).)

Accordingly, the Commission should find that DEC should use a methodology to calculate avoided cost rates for Cherokee that is consistent with the peaker methodology approved by the Commission in Order No. 2019-881(A), and find that Witness Strunk's avoided capacity cost calculations are demonstrably higher than DEC's avoided cost at any point since negotiations commenced and cannot be implemented without overcharging customers at unjust and unreasonable rates and treating Cherokee more favorably than any other Large QF.

III. <u>Conclusion</u>

With respect to both issues raised on reconsideration, the Commission's Order, as it stands, risks treating Cherokee more favorably than other similarly situated QFs and imposing unjust and unreasonable avoided cost rates on DEC's customers.

By finding that Cherokee created a legally enforceable obligation in September 2018 when it could, and did, walk away from the offer without consequence, the Commission is allowing Cherokee access to rates that the Companies would not normally make available to a QF without more meaningful commitment. Likewise, if the Commission were to instruct DEC to pay Cherokee for unneeded capacity, Cherokee would receive a windfall paid for by DEC's customers.

For these reasons and for all of the reasons set forth herein and in the Companies' Post-Hearing Brief, the Companies respectfully request that the Commission:

(3) Reconsider its finding that Cherokee County Cogeneration Partners, LLC ("Cherokee") established a legally enforceable obligation ("LEO") with DEC as of September 17, 2018; and

(4) Clarify that, regardless of LEO date, DEC should use an avoided cost methodology that is consistent with the methodology determined and approved by the Commission in Order No. 2019-881(A) to calculate just and reasonable avoided cost rates to be paid to Cherokee.

Respectfully submitted this, the 7th day of September, 2021

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